Supreme Court, U.S.
FILED
06-648 SEP 5 - 2006
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CAUSE NUMBER: _____

IN THE SUPREME COURT
OF THE UNITED STATES

TARYLL MILLER
Petitioner

V

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a routine recitation of the warnings required by *Miranda v. Arizona*, ,384 U.S. 486 (1966), followed by a detailed explanation of what criminal activity the police believed the accused had committed and accompanied by a promise not to arrest him if he cooperates and agrees to talk truthfully, satisfy the voluntariness required of a confession or undermine the right to remain silent under the Fifth Amendment and the right to the assistance of counsel under the Sixth Amendment?

CORPORATE DISCLOSURE STATEMENT

There are no corporations involved in this case.

The case caption contains the names of all parties to the case. The United States of America is represented by the Soliciter General. Taryll Miller is represented by Patrick J. Arata, a member of the bar of this Court and Linda M. Wagoner, a member of the Seventh Circuit Court of Appeals.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

CITATIONS OF OPINIONS 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR ISSUING WRIT 4

ARGUMENT 4

APPENDIX

SEVENTH CIRCUIT OPINION ..... App. 1

ENTRY ON DEFENDANT'S MOTION TO SUPPRESS ..... App 11

TABLE OF AUTHORITIES

CASES

Berkemer v. McCarty 468 U.S. 420 (1984) 4

Colorado v. Connelly, 479 U.S. 157 (1986) 4

Dickerson v. United States, 530 U.S. 428 (2000) 2

Miranda v. Arizona, ,384 U.S. 486 (1966) 2, 3, 4

Missouri v. Seibert, 542 U.S. 700 (2004) 3, 4

FEDERAL STATUTES

18 U.S.C. § 3231 i

28 U.S.C. § 1291 i

CITATIONS OF OPINIONS AND ORDERS

The opinion of the Seventh Circuit sought to be reviewed under cause number 05-2978 is reported at 450 F.3d 270 (7th Cir. 2006). (App. P. 1). There was no petition for rehearing filed.

The decision of the District Court denying the Motion to Suppress, rendered January 21, 2005 was a written, unpublished opinion. (App. P. 11) under cause number IP 03-0180-CR-T/F, Southern District of Indiana.

STATEMENT OF JURISDICTION

The judgment of the Seventh Circuit sought to be reviewed was entered June 7, 2006.

The basis for jurisdiction in the district court was conferred by 18 U.S.C. § 3231. The Seventh Circuit's jurisdiction was conferred by 28 U.S.C. § 1291 and 1294.

CONSTITUTIONAL PROVISIONS

The Constitutional Provisions involved include the Fifth and Sixth Amendments to the Constitution and are as follows:

(The Fifth Amendment))

> No person shall..... be compelled in any criminal case to be a witness against himself or herself...

(The Sixth Amendment)
In all criminal prosecutions, the accused

shall enjoy the right .... to have the Assistance of Counsel for his defense.

The Supreme Court should grant the writ to declare that it is improper to insist upon a waiver of the Fifth Amendment and Sixth Amendment in order to avoid having third parties arrested.

STATEMENT OF THE CASE

Taryll Miller was charged with a violation of 21 U. S.C.A. § 841(a); the district court exercised jurisdiction under 18 U.S.C. § 3231. The charge was based upon the following facts:

Taryll Miller was stopped for a traffic violation upon an order from a narcotics officer who had a warrant to search Miller's home. The traffic officer read the warnings required by *Miranda v. Arizona,* 384 U.S. 436 (1966) and *Dickerson v. United States,* 530 U.S. 428 (2000). The narcotics officer soon arrived at the traffic stop and informed Miller of the scope of his investigation, indicating that Miller was going to go to jail unless he agreed to immediately talk truthfully with the officer, i.e., cooperate, in which case Miller would be able to keep his truck and Miller's girlfriend/roommate (and mother of his infant child) would not be arrested.

Miller was taken home, in handcuffs, where the police encountered his girlfriend and the infant. A search was conducted which produced cocaine and firearms. Miller was then taken to the police station where the police continued talking with him. During this conversation, Miller asked if he needed a lawyer if he cooperated and the police told him that he did not need a lawyer, and if he asked for one, both he and his girlfriend would immediately be arrested. (App. P. 20) They both were, in fact, later arrested when he reneged on his

promise to cooperate.[1] He was again advised of his rights and made a tape-recorded statement concerning his role in the offense.

The conduct of the police was coercive because it eliminated a rational choice, in spite of the fact that the officers recited *pro forma* the warnings required by *Miran*da. As the District Court found, Miller was young, relatively inexperienced with law enforcement and uneducated. (App. P. 39). He was initially stopped for what he believed to be a routine traffic stop and immediately admitted that he knew he was driving without a valid license. He was then bombarded with the information that the police believed him to be a distributor of cocaine in the Indianapolis area and told that he would go away for a very long time, beginning immediately, or he could cooperate and get out of jail free. He was promised he could keep his truck and told that his girlfriend would not be arrested. In other words, the police gave him no practical choice but to waive his right to remain silent and talk to them without consulting with counsel, which he did. The conversation at the police station (which was recorded, possibly unknown to Miller [App. P. 21]) was more direct; a request to consult with a lawyer would eliminate any possibility of cooperation.

As this Court noted in *Missouri v. Seibert*, 542 U.S. 700 (2004), it is absurd to think that a mere recitation of the litany suffices to satisfy *Miranda*. The touchstone of *Miranda* is that the person know and understand the right to remain silent and the right to consult with counsel. Miller, after executing a written waiver of rights, asked if he would need to consult with a lawyer if he agreed to cooperate. He was explicitly told that a request for counsel would cease any ability to cooperate and result in prolonged incarceration for himself and his girlfriend. Nearly one hour later, he gave his formal, taped statement.

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[1]The girlfriend was not charged in federal court.

The District Court found the police behavior to be improperly coercive; the Seventh Circuit disagreed, finding that the District Court erred in excluding statements offered after the exchange. (App. P. 2).

REASON TO ISSUE WRIT

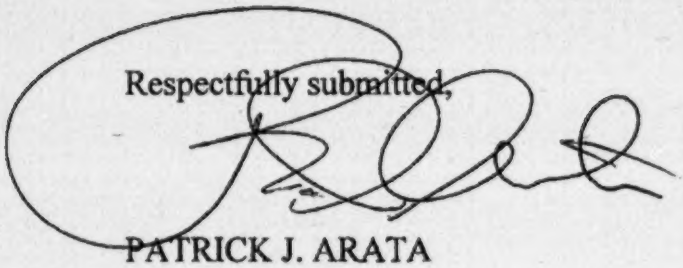
The writ should issue to clarify those situations when a recitation of the required litany under the Fifth Amendment is insufficient to establish a knowing and voluntary waiver of the right to counsel under the Sixth Amendment, as noted in *Missouri v. Seibert,* 542 U.S. 600 (2004).

ARGUMENT

A reasonable person in Miller's shoes would not have understood the recitation of the four constitutional protections to mean that he retained any choice about talking to the police. *Berkemer v. McCarty* 468 U.S. 420 (1984). He was told, from the beginning, that the only way he could avoid jail and the arrest of himself and his girlfriend was to talk to the officer who was willing to listen if he was honest. That admonishment, on its face, demands a waiver of both the right to remain silent and the right to consult with an attorney (to determine the accuracy of the advice). The detective's approach was the subtle psychological coercion in a custodial setting *Miranda* was designed to prevent. Accord: *Colorado v. Connelly,* 479 U.S. 157 (1986).

The writ should issue to clarify those situations when a recitation of the required litany under the Fifth Amendment is insufficient to establish a knowing and voluntary waiver of the right to counsel under the Sixth Amendment, as noted in *Missouri v. Seibert,* 542 U.S. 600 (2004).

Respectfully submitted,



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In the
United States Court of Appeals
For the Seventh Circuit

No. 05-2978

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TARYLL MILLER,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:03CR000180-001—John Daniel Tinder, *Judge.*

ARGUED APRIL 19, 2006—DECIDED JUNE 7, 2006

Before COFFEY, EASTERBROOK, and MANION, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Taryll Miller was convicted of distributing cocaine and sentenced to 300 months' imprisonment. He contends that statements he made to the police should have been suppressed as involuntary, but the district court's findings of fact make that argument frivolous. Miller was twice given *Miranda* warnings before saying anything, and the district court concluded that the police did not engage in any coercive tactics that would spoil the voluntariness of the statements Miller made in his car and at his home. Miller contends that the police threatened to arrest his girlfriend and put their

child in foster care if he did not confess; the judge found otherwise, and that conclusion is not clearly erroneous.

According to Miller, the district judge acted inconsistently by excluding statements he made at the police station while allowing the prosecutor to use the statements he had made earlier in his car and at his home. The judge concluded that, at the station, the police *had* threatened to arrest him and his girlfriend if he asked for an attorney or exercised his right to remain silent, and that this threat made his statements involuntary. There is no factual inconsistency: the judge concluded that the threat had been made at the police station but not earlier. See *United States v. Adeyeye*, 359 F.3d 457, 462 (7th Cir. 2004). And if there is legal inconsistency, Miller is the beneficiary, because the judge should have allowed all of the statements to be admitted into evidence.

The police offered Miller a way to retain his freedom: come clean and cooperate in the investigation of his suppliers and customers. If Miller chose silence plus counsel, implying an adversarial stance—as the police told him he had every right to do—the natural consequence was immediate custody and prosecution for Miller and his girlfriend. The police had probable cause to arrest them both, for the house they shared contained not only illegal drugs but also illegal weapons (including an AK-47 assault rifle). Miller chose to pledge cooperation and both were left at liberty, just as the police had promised. Miller was not prosecuted until after he reneged on his pledge to help the investigation.

A choice between cooperation and freedom, on the one hand, and silence followed by custody and prosecution, on the other, is a common one. This is the real choice many suspects face whether or not the police lay it out it in so many words; clear articulation of the options makes a choice better informed and thus more rather than less

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voluntary. That's why we held in *Johnson v. Trigg*, 28 F.3d 639 (7th Cir. 1994), that a promise to release the suspect's mother from custody if he confesses does not make his statement involuntary; if the police have good ground for holding the mother, the information adds to the options at the suspect's disposal. Cf. *Arizona v. Fulminante*, 499 U.S. 279 (1991); *Colorado v. Connelly*, 479 U.S. 157 (1986); *Miller v. Fenton*, 474 U.S. 104 (1985). Suspects are not entitled to full information, see *Ohio v. Robinette*, 519 U.S. 33 (1996); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), but can't complain when they get it and learn that some of the options are unpalatable.

An objectively unwarranted threat to arrest or hold a suspect's paramour, spouse, or relative without probable cause could be the sort of overbearing conduct that society discourages by excluding the resultant statements. See *Lynumn v. Illinois*, 372 U.S. 528 (1963) (which we understood in *Johnson* to demonstrate that hostage-taking is unduly coercive). But a factually accurate statement that the police will act on probable cause to arrest a third party unless the suspect cooperates differs from taking hostages. Cf. *Hartman v. Moore*, 126 S. Ct. 1695 (2006) (probable cause for criminal accusation defeats a claim for damages based on retaliatory prosecution). Miller has not given us any reason to doubt that the police accurately stated what they would do if he clammed up, and he does not deny that the Constitution would have allowed them to carry out that plan, for they had probable cause to arrest both Miller and his girlfriend. This is not to say that candor always is essential; a modicum of trickery is tolerable during criminal investigations. See *United States v. Ceballos*, 302 F.3d 679, 694-95 (7th Cir. 2002); *Holland v. McGinnis*, 963 F.2d 1044, 1055 (7th Cir. 1992); *United States v. Rutledge*, 900 F.2d 1127, 1130-31 (7th Cir. 1990). How far agents may go to mislead is not

in question here, however, for they told Miller the (unwelcome) truth.

Requiring the police to keep their plans secret could not help suspects: if Miller had been unable to make a deal by offering information and cooperation, then both adult occupants of the place where the drugs and guns were found could have been arrested; their arrests would have made it necessary to institutionalize their child or place him in foster care unless relatives were available and willing to assist. Miller was able to keep his girlfriend and child together by providing information and a promise of cooperation. The choice that the police extended—cooperate and remain free, or be silent and enter custody together with the confederate in his household—made him better off than official reticence and his own ignorance of consequences would have done. An offer that makes the recipient better off cannot be condemned as coercive. See *Henn v. National Geographic Society*, 819 F.2d 824 (7th Cir. 1987). It would be unthinkable to have a legal rule requiring the police to say, in response to a suspect's inquiry: "We are forbidden to tell you what will happen to you, your girlfriend, and your child if you decline to cooperate."

Now we turn to the penalty for Miller's crimes. When imposing sentence, the district judge took into account testimony at another trial. The informant who led the police to Miller was murdered, and Miller's uncle was convicted of that crime. The district court considered the transcript of the uncle's testimony at that trial. Although the transcript is not in the appellate record—a shortcoming for which Miller is responsible, see Fed. R. App. P. 10(a)—the appellate briefs tell us that Miller's uncle named him as an accessory in the murder. Miller contends that the court's consideration of this transcript violates the Constitution, because the uncle was not subject to cross-examination at his sentencing. See

Crawford v. Washington, 541 U.S. 36 (2004). But *Crawford* rests on the confrontation clause of the sixth amendment, which the Supreme Court has held does not apply to sentencing. *Williams v. New York*, 337 U.S. 241 (1949). We therefore concluded in *United States v. Roche*, 415 F.3d 614, 618 (7th Cir. 2005), that *Crawford* does not make hearsay inadmissible once guilt has been established.

Nor does the combination of *Crawford* with *United States v. Booker*, 543 U.S. 220 (2005), change the rules of evidence at sentencing. See *United States v. Luciano*, 414 F.3d 174, 179 (1st Cir. 2005); *United States v. Martinez*, 413 F.3d 239, 243-44 (2d Cir. 2005); *United States v. Brown*, 430 F.3d 942, 943 (8th Cir. 2005). The remedial portion of *Booker* deprives the Sentencing Guidelines of their quality as "laws," a step that enables judges to resolve factual disputes as they did before that decision. See *United States v. Watts*, 519 U.S. 148 (1997). By statute, "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. §3661. Judges should not lean on unreliable hearsay, but testimony in another trial, subject to cross-examination in open court, is among the most reliable kinds of hearsay. Miller was free to call his uncle to the stand in his own sentencing if he wanted to pursue this subject, but he chose not to do so; perhaps he thought that this would open the door to details that he preferred the judge not to learn. Nor did Miller offer any other evidence on the subject of the informant's murder, or ask the United States to produce any person for examination as a hostile witness. The court offered him an opportunity to test his uncle's statements in a way that could sift fact from fiction; the decision not to use this opportunity squelches Miller's argument based on the due process clause. See *United*

States v. Atkin, 29 F.3d 267 (7th Cir. 1994). His argument rests (as it must given his decision not to put his uncle's testimony in the appellate record) on the proposition that hearsay *never* can be used in sentencing, and that proposition is wrong.

Even without treating Miller as an accomplice to murder, the Sentencing Guidelines prescribed a range of 324 to 405 months. The district judge refused to apply the Guidelines as written, however. Following 21 U.S.C. §841(b)(1)(B), which was enacted in 1986, the Guidelines have treated 1 gram of crack cocaine the same as 100 grams of powder cocaine since their inception. In 1995 the Sentencing Commission announced amendments that would have equated the sentences for powder and crack cocaine, while leaving in place the differential mandatory minimum sentences that are beyond the Commission's remit. That proposal, however, was disapproved under the procedure specified by 28 U.S.C. §994(p) when both Houses of Congress passed, and the President signed, legislation canceling the revision. Pub. L. 104-38, 109 Stat. 334 (1995).

In 1997 the Commission issued a report asking Congress to change the statute or at least allow it leeway over sentences that exceed the mandatory minimums; the legislature took no action. In 2002 the Commission again recommended that Congress reduce the ratio, this time suggesting 20-to-1 if not lower. United States Sentencing Commission, *Cocaine and Federal Sentencing Policy* (2002). Congress once again did not enact legislation implementing this proposal, but the district judge declared that *Booker* had freed the judiciary to adopt the Commission's 2002 recommendation on its own. Disagreeing with Congress's decisions of 1986 and 1995, the district judge employed a 20-to-1 conversion and recalculated the range as 262 to 327 months. He selected the sentence of 300 months from within that range (implying that he gave

little if any weight to the possibility that Miller had contributed to the informant's murder).

Although 300 months is below the actual Guideline range, Miller contends that the sentence nonetheless is unreasonably high. He maintains that crack and powder cocaine should be treated as identical, as the Commission proposed in 1995, and as he sees it a 1-to-1 ratio would have reduced the applicable sentencing range to 210 to 262 months. Changing the crack-to-powder ratio need not have this effect, however. The Commission proposed a different ratio but not necessarily lower penalties. If Congress had accepted the Commission's proposal, it could have reduced the conversion factor by raising the sentences for powder cocaine while leaving sentences for crack alone, or it could have raised powder sentences while reducing crack sentences so that the two ranges converged midway.

A more fundamental problem with Miller's position—with the district court's as well—is that the judiciary is not free to replace Congress's approach with one that it deems superior. See, e.g., *Neal v. United States*, 516 U.S. 284 (1996); *Chapman v. United States*, 500 U.S. 453 (1991). By legislative decision, the 100-to-1 ratio appears in the Guidelines as well as the statute, and we have held that the choice is a constitutional one. See *United States v. Spencer*, 160 F.3d 413 (7th Cir. 1998); *United States v. Westbrook*, 125 F.3d 996, 1010 (7th Cir. 1997); *United States v. Lawrence*, 951 F.2d 751, 753-56 (7th Cir. 1991).

Although the district judge thought that *Booker* relieves the judiciary of any need to respect these rules—and Miller wants this court to take even greater liberties than the district judge did—the Supreme Court did not alter any substantive norms in that decision. As we pointed out in *United States v. Cannon*, 429 F.3d 1158 (7th Cir. 2005), when holding that *Booker* does not permit district judges

to disregard mandatory minimum sentences or change the treatment of recidivist offenders, all that *Booker* does is specify the appropriate decision maker (the jury) and the burden of persuasion (beyond a reasonable doubt) for facts that affect statutory maximum penalties.

The Supreme Court did not alter which facts (once found) have what legal consequences. See also, e.g., *United States v. Duncan*, 413 F.3d 680, 683 (7th Cir. 2005); *United States v. Rivera*, 411 F.3d 864, 866-67 (7th Cir. 2005); *United States v. Lee*, 399 F.3d 864, 866 (7th Cir. 2005); *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir. 2005). That is why both courts of appeals that have considered this issue have held that after *Booker* district judges are obliged to implement the 100-to-1 ratio as long as it remains part of the statute and the Guidelines. See *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006); *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006). Cf. *United States v. Cawthorn*, 429 F.3d 793, 802-03 (8th Cir. 2005) (ratio not "unreasonable" as the *Booker* remedial majority used that term).

We held in *United States v. Gipson*, 425 F.3d 335 (7th Cir. 2005), that defendants are not entitled to a deviation from the statutory ratio. Now we add, in agreement with *Eura* and *Pho*, that district judges must continue to carry out the legislative choice, even though there may be powerful reasons for change.

Booker does make the Guidelines advisory rather than binding, so *after* computing the sentencing range according to the statute and Guidelines a judge has discretion to impose a reasonable sentence that is outside the range (provided that statutory minimum penalties are respected). What makes a sentence "reasonable," however, depends on the specifics of the case at hand; 18 U.S.C. §3553(a), which lists the factors that control after *Booker*, does not include a factor such as "the judge thinks the law misguided."

Section 3553(a)(6) tells judges to take account of "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct", but a judge is not a free agent when assessing whether a difference is "unwarranted": that question, like many others, depends on legal rules. Thus we held in *United States v. Boscarino*, 437 F.3d 634 (7th Cir. 2006), that one properly established Guideline range may not be treated as an "unwarranted" disparity compared with some other valid sentence (say, one that includes a discount for a guilty plea or cooperation with the prosecution). "Sentencing disparities are at their ebb when the Guidelines are followed, for the ranges are themselves designed to treat similar offenders similarly. That was the main goal of the Sentencing Reform Act. The more out-of-range sentences that judges impose after *Booker*, the more disparity there will be. A sentence within a properly ascertained range therefore cannot be treated as unreasonable by reference to §3553(a)(6)." 437 F.3d at 638. *United States v. Martinez-Martinez*, 442 F.3d 539 (7th Cir. 2006), and *United States v. Galicia-Cardenas*, 443 F.3d 553 (7th Cir. 2006), apply that rule by holding that differences created by fast-track programs in some districts, conducted under statutory authority, are not "unwarranted." So, too, differences called for by §841(b)(1)(B) and supported by the protocols that U.S.S.G. §2D1.1 prescribes for comparing different weights and kinds of illegal drugs are not "unwarranted." The warrant for these differences lies in decisions taken by Congress and the Sentencing Commission.

Miller should give thanks that the United States did not file a cross-appeal. Had it done so, then as in *Eura* and *Pho* resentencing under the statutory ratio would have been required. As it is, the prosecutor was content with Miller's 300-month sentence, and the lack of a cross-appeal protects him against any increase. See *El Paso Natural*

Gas Co. v. Neztsosie, 526 U.S. 473, 479-82 (1999); *Rivera*, 411 F.3d at 867. He is not entitled to any further reduction.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA	)	
	)	
Plaintiff	)	
	)	
vs.	)	IP 03-180-CR-01-T/F
	)	
TARYLL MILLER	)	
	)	(Filed Jan. 21, 2005)
Defendant	)	

ENTRY ON DEFENDANT'S MOTION TO SUPPRESS[1]

This matter comes before the court on the motion to suppress filed by Defendant Taryll Miller. Miller moves for the suppression of (1) a search warrant issued on October 10, 2003, and any and all evidence discovered as a result of the warrant's execution; (2) any and all evidence discovered as a result of a traffic stop of his vehicle on October 14, 2003; and (3) any self-incriminating statements he made on October 14, 2003. A suppression hearing was conducted on December 29, 2004, and continued on January 3, 2005, and January 19, 2005. Witnesses were sworn and evidence heard. The court, having considered the evidence and arguments of counsel, now rules

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[1] This Entry is a matter of public record and may be made available to the public on the Court's web site, but it is not intended for commercial publication either electronically or in paper form. Although the ruling or rulings in this Entry will govern the case presently before this Court, this Court does not consider the discussion in this Entry to be sufficiently novel or instructive to justify commercial publication or the subsequent citation of it in other proceedings.

as follows:

I. FACTUAL FINDINGS [2]

A. The Search Warrant

On October 13, 2003, Indianapolis Police Detective Rob Foster swore to an affidavit seeking authority to search an apartment located at 6644 Greenshire Drive, within the Avalon Lake Apartments complex on the northeast side of Indianapolis, Indiana, as well as the person of Taryll Miller and any vehicles on the premises under his control. The object of the search was cocaine and 'any records, papers, documents, U.S. currency, weapons, computer hardware or software, pagers and or cellular phones and any other paraphernalia that might indicate or tend to indicate evidence of narcotics trafficking or use.' (Def.'s Ex. A.)

Foster's affidavit was approximately two pages in length, single-spaced, and signed. The crux of the information contained in it related to the activities of and information provided by an unidentified confidential informant ('CI'). According to Foster, the CI came to him, reporting that a black male known to the CI as 'Taryll,' with a telephone number of (317) 698-9496, was selling cocaine. The CI further indicated that he/she had purchased cocaine from Taryll in the past and could do so again if desired. Through a background check and police district patrol officers' intelligence information, Foster concluded that 'Taryll' was actually a black male named Taryll Miller, with a date of birth of 8/27/79. With the Avalon Lakes apartment address of 6644 Greenshire Drive (the 'residence'). According to Foster, the CI confirmed that identification. Foster also reported that a public utilities check disclosed this address to be the residence of Annocha Frierson. The affidavit

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[2]These findings are made using a "preponderance of the evidence" standard of review, with the government bearing the burden of proof. See *Nix v. Williams*, 467 U.S. 431, 444-45 n.5 (1984).

also disclosed that an Indianapolis Police Department database contained a prior police report linking Miller and Frierson, in that several items belonging to Miller had been stolen from a residence of Frierson (the affidavit does not indicate whether the residence in the report is the same Greenshire Drive location, or some prior residence).

The time frame in which Foster obtained this information does not appear in the affidavit. However, Foster does indicate that within seventy-two hours of October 13, 2003, drug investigation surveillance of the residence was conducted and the CI made a telephone call in his presence to someone named Taryll at the number of (317) 698-9496. Foster overheard the conversation. Approximately five minutes after the phone call was placed, a black male was observed by Detective Jeff Avington exiting the residence and driving away in a Chevrolet Silverado pick-up truck. This individual was followed under constant (presumably surreptitious) surveillance by members of the Metro Drug Task Force as he traveled away from the residence. The suspect made no stops between the residence and the designated meeting location.

In the meantime, according to the affidavit, Foster searched the CI's person and vehicle for contraband. None was found. The CI's personal money was taken and held by Foster, who in turn provided the CI with prerecorded U.S. currency. Foster then followed the CI to the meeting spot that had been designated in the earlier telephone conversation. At this location, a black make standing 5'7' to 5'9' and weighing approximately 180 to 200 pounds exited the vehicle that had been followed from the residence and made contact with the CI. Foster then observed an encounter between the suspect and the CI. After the meeting was completed, Foster followed the CI to another predetermined location where the CI handed him a clear plastic bag containing a chalky, off-white substance suspected to be crack cocaine in an amount greater than three

grams. Foster again searched the CI, with negative results. The Marion County Forensic Services Agency Subsequently confirmed that the substance was indeed cocaine.[3]

Foster's affidavit further reports that surveillance operations of the residence, conducted by unnamed Task Force operatives on unknown dates, determined that Defendant Miller came and went from the residence in a variety of different vehicles. Foster stated in the affidavit that he has 'found it common,' in his training and experience as a police officer and narcotics detective, 'that distributors of narcotics often keep a larger volume of narcotics, U.S. currency, records and documents related to narcotics distribution, inside of a residence, with transportation of illegal narcotics and currency occurring in a vehicle.'

Defendant Miller asserts by way of his own affidavit that Foster's affidavit contained several errors and deficiencies. Specifically, Miller avers that he did not have the phone number of (317) 698-9496, and that a review of phone company records would have disclosed that the phone was not in his name.[4] Miller further claims that he believes the CI to be a particular person to whom he has never sold or agreed to sell drugs.[5] Finally, Miller describes himself in his affidavit as a

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[3] Foster testified at the suppression hearing that this "controlled buy" took place on October 10, 2003, and that two previous controlled buys occurred on September 10, 2003, and September 18, 2003, all of which involved Miller. The September buys are not mentioned in Foster's affidavit.

[4] Curiously, Miller does not deny having used a telephone number with that number.

[5] Miller does not indicate the basis of his belief that the CI is a particular person, nor does he deny having talked to or met with that person prior to October 13, 2003, under the circumstances described in Foster's search warrant affidavit. Thus, this claim will be ignored.

'light complexion black male' who had a large, clearly visible tattoo on his left arm. Miller also states that he wore his hair in cornrows in October 2003, but at the hearing the government introduced a photograph which leads the court to conclude that, at least on October 14, 2003, Miller did not enjoy such a hairstyle.

B. The Stop

The events leading up to the execution of the search warrant are described in a second affidavit executed by Detective Foster on October 24, 2003, in an effort to obtain an arrest warrant for Defendant Miller, as clarified by the evidence presented at the suppression hearing. According to the second affidavit, after the search warrant was obtained members of the Metro Drug Task Force conducted surveillance on the residence on October 14, 2003, beginning at around 2:46 p.m. At approximately 3:25 p.m. on that date, a black make believed to be Taryll Miller arrived at the residence in a black Chevrolet Silverado truck with a temporary plate and entered the building. Surveillance was continued on the apartment while detectives and uniformed police began arriving in the nearby area to participate in the search. At some point before the search, Foster held a debriefing in which he relayed various pieces of information about the Miller investigation to the participating police personnel. Various Task Force detectives and Foster had observed and videotaped Miller in the same Silverado truck prior to October 14, and Foster had determined from a records check that Miller's driver's license was suspended, and he communicated that fact to the IPD Officer Wildauer.

As of around 5:30 p.m. the search warrant still had not been executed and Miller left the apartment in his Silverado. Miller claims that the was heading toward his mother's house in the 3700 block of East 32nd Street in Indianapolis. At about 5:59 p.m., Miller's Silverado was stopped by a police officer

assisting the drug investigation, Craig Wildauer, in the area of 46th Street and Millersville Road in Indianapolis. In his second affidavit, Foster states that he observed Miller make several lane violations ('break lane control') in the area of 5500 Kessler Boulevard while operating the Silverado. Officer Wildauer testified that he stopped Miller for two traffic violations: Failure to signal prior to a turn and a lane violation. Miller claims he was told by Officer Wildauer that the reason for the stop was that Miller's left turn signal was not working. Miller claims to have informed Wildauer that his signal was not defective and that he did not violate any traffic laws[6], but concedes that his license was suspended and that he admitted as much to the police officer.[7] Officer Wildauer confirmed the license suspension through a records check, ordered Miller out of the truck, and searched him. The search of Miller's person and vehicle revealed a Glock handgun, a gun permit, and $397.00 in cash. Wildauer confiscated these items, placed

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[6] Although Miller claims the stop was premised on a defective signal and Wildauer maintains the stop was premised on a failure to signal, the court credits Wildauer's version of events based on the credibility of his testimony at the hearing, his extensive experience as a patrol officer and his knowledge of the traffic laws.

[7] Foster testified that he informed Officer Wildauer of Miller's suspended license at the debriefing held prior to this operation.

Miller in handcuffs, [8] read the *Miranda* warnings to him, [9] and detained him in his patrol car.

C. The Search and Interrogation

Approximately twenty minutes after Officer Wildauer's traffic stop of Defendant Miller, Detective Foster arrived on the scene. Foster observed Wildauer advise Miller of his *Miranda* rights. At around 6:17 p.m., Foster too advised Miller of his *Miranda* rights, which he read to the Defendant from a card that was produced at the suppression hearing.[10] Miller was still seated in the back of Wildauer's patrol car at the time, with Foster leaning in through a window as he read from the card. Although Miller remained handcuffed during the apprisal of rights, none of the officers on the scene had their weapons drawn. Miller indicated that he understood his rights and agreed to talk with Foster. Foster then began questioning Miller about his involvement in the drug trade. At some point at stop site, Foster took Miller out of Wildauer's

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[8] Foster indicates that Miller was "being detained" at this point and Miller asserts that he was "arrested." This difference in interpretation is of no consequence. Regardless of whether the stop had developed into an arrest at that point, Miller was not free to leave the 46th Millersville scene. Miller was never issued a traffic violation citation regarding the events of October 14.

[9] Miller does not indicate which officer read him the *Miranda* warnings. Foster says that he rad the *Miranda* warnings to Miller from a card he carries with him and that Miller stated that he understood. Wildauer also testified that he advised Miller of his rights. It appears that Miller concedes that he was given the *Miranda* warnings by someone at the 46th and Millersville scene, but he denies that Foster advised him of his rights while they were subsequently at the residence.

[10] Miller does not contend that the form or manner of the reading of the rights by Foster was deficient, and the language Foster says that he used will not be repeated here.

vehicle and put him in his own unmarked police car. During the course of their discussion, Foster read Miller the contents of the search warrant, and did so when they were seated by each other, with the warrant in Foster's hands and in front of Miller. Miller was told that Foster would listen to him, but only if he was honest with him. In talking about potential of cooperating with law enforcement, Miller expressed his concern that others involved in the drug trade would become aware of his cooperation if his vehicle was taken from him. Foster indicated to Miller that he could retain his vehicle temporarily, but that eventually, it was likely to be seized. Foster also arranged to have Miller's vehicle driven back to Miller's apartment by another officer, and it was left there after the activities of the evening were concluded. After some discussion between Foster and Miller at the stop site, Foster drove a handcuffed Miller back to his apartment, arriving shortly before 7:00 p.m.

Upon arriving at the residence at 6:57 p.m., the search warrant was executed. After knocking and announcing their presence,[11] the officers used a key taken from Miller to enter the apartment. The officers did not ask for Miller's consent. Approximately four to five officers entered the apartment at this time, and at least some of them, if not all, did so with their guns drawn.[12] They were unaware if anyone was inside. Upon

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[11] The court notes that even if the police did not knock prior to entry, a violation of the knock-and-announce rule "does not authorize exclusion of evidence seized pursuant to the ensuing search." *United States v. Langford*, 314 F. 3d 892, 894 (7th Cir. 2002).

[12] Before the search took place, Foster had information that Miller may have firearms in his possession and in his residence. One powerful handgun was taken from him at the scene of the traffic stop. Police reports indicated that Miller had been the victim of a home invasion and that he had shot at a couple of suspects during that incident.

entry to the apartment, the officers encountered Ms. Frierson holding her infant son. She had no weapons on her person, and was in the living room of the apartment, down a hallway from the entryway. She was seated on the sofa with the baby. Foster read Ms. Frierson the search warrant. Shortly thereafter, Miller was brought inside. Miller and Frierson were kept apart, with Miller being held on the second floor of the apartment and Frierson on the first floor. Frierson was questioned and was generally cooperative, answering questions about her involvement in drugs.

During the search, Detective Barb Maxey located an off-white substance that appeared to be crack cocaine in a kitchen drawer, along with both digital and 'flip' scales, a piece of hard plastic, and a chrome weight. Previously, while still at the traffic stop site, Miller had told Foster that cocaine would be found in the drawer. The off-white substance later tested positive as 114.53 grams of cocaine and the remaining items in the drawer tested positive for cocaine residue. According to Foster, Miller also directed the officers to an AK47 assault rifle under the bed he shared with Ms. Frierson. The rifle was found where described, loaded with a round in the chamber. A search of the bedroom also lead to the discovery of $2,254.00 in cash, including the prerecorded currency used by the Task Force in a prior controlled buy from Miller. Two additional rifles were located in a downstairs coat closet, one of which Miller stated he had received in trade for crack cocaine.

Miller was questioned by Foster and Detective Bradbu ry while other officers continued the search of the apartment. The questioning process was not continuous in that breaks were taken at various times. The Defendant asserts that he was

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Foster also possessed the general knowledge of the association of drugs and violence, and appropriately, had a healthy apprehension of the unknowns that the officers were facing in entering the apartment.

threatened with arrest, that his girlfriend, Ms. Frierson, would be arrested, and that their son would be put in a public shelter if he did not cooperate. Detective Foster recalled telling Miller that his girlfriend was subject to arrest, but did not recall mentioning anything about the child, nor did he recall any other officer saying that to Miller about the child.[13] At about 9:00 p.m., Foster, Bradbury and Miller left the apartment to travel to the East District Indianapolis Police office. They arrived at the district office at about 10:00 p.m. While en route, they stopped at a McDonald's restaurant for refreshments. They went through the drive-through window, parked at the restaurant, and Detective Foster ate while Miller had at least a beverage. While at the McDonald's, Foster and Miller had a conversation that Foster described as amiable, without yelling, and that they were talking as though they were comfortable with each other.

Shortly after arriving at the East District office, Miller, Foster, and Bradbury met in an interview room which was approximately twelve feet by twelve feet in size. Miller was not handcuffed during this session and did not appear to be under the influence of drugs or alcohol at the time. Foster presented an advice-of-rights form to Miller, and had him read it. Miller had indicated that he could read and write the English language and that he had a GED. Foster also read the form to Miller. Miller placed his initials next to each of the five rights[14] listed on the form and signed the portion of the

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[13] Resolution of this factual dispute is discussed in Part II.C of this Entry.

[14] Again, there is no contention that the listing of the rights on the form was inadequate, so they will not be repeated here. The Defendant does not assert that he was unaware of his *Miranda* rights. The Defendant's contention is that he was merely told to sign the form

form indicating that it was his desire to waive his rights, answer questions, and make a statement. Both Foster and Bradbury witnessed Miller's signature. The form is dated October 14, 2003, and has a time of 10:07 p.m. Though it is unclear whether Miller realized that his statements were being recorded between 10:07 p.m. and 11:00 p.m., Detective Foster did so record through the use of an electronic recording devise that produced a compact disc of the conversation, introduced into evidence at the hearing as Defendant's Exhibit 'A.' On this compact disc, Miller can be heard asking if he needed a lawyer should he decide to cooperate with law enforcement. Foster replied by saying that Miller did not need a lawyer, and that if he asked for one, both he and Ms. Frierson would be arrested. Miller stated that he 'understood.' From that point on, the conversation consists of Miller making statements related to his role in the drug trafficking trade, as well as several congenial statements unrelated to criminal activity.

At approximately 11:00 p.m., Foster began recording a 'taped statement' given by Defendant Miller through the use of a tape recorder that was separate from the electronic recording devise used to make the aforementioned compact disc. Foster indicated that the taped statement would be used to charge Miller with a crime if he later decided not to cooperate, and that the scope of the statement would be solely limited to his role in the drug trade and not the roles of any other individuals. The Defendant was responsive to questions by Detectives Foster and Bradbury, and the tone of the interview was conversational. There is no indication of loud of forceful voices being used by the police, and Miller's responses were given promptly with no indication of hesitancy. The taped statement lasted for approximately fifteen minutes, and a copy

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and that he did not voluntarily waive his rights nor voluntarily make any incriminating statements.

of the tape was introduced into evidence at the hearing as Government's Exhibit 3, with a transcript as Government Exhibit 2. The compact disk recording (Def.'s Ex. A) also recorded this same confession. Shortly after completion of the taped statement, Defendant Miller was driven back to his apartment, released, and told that the police would get back in touch with him.

II. LEGAL CONCLUSIONS

A. Validity of Search Warrant

Defendant Miller's motion first argues that the October 13, 2003, search warrant (the 'warrant') must be suppressed under the Fourth Amendment. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. Miller contends that the evidence seized as a result of the warrant should be suppressed for a number of reasons. First, Miller argues that the search warrant was not supported by probable cause, and that the good faith exception to the exclusionary rule should not apply. Second, Miller claims that the issuing Judge merely 'rubber stamped' the warrant, making it invalid, as well as removing any possible basis for a good faith exception.

1. Probable Cause

In this case, an Indiana judge determined that probable cause existed to search the residence at 6644 Greenshire Drive. The court gives deference to the warrant-issuing judge's determination of probable cause so long as 'there is substantial evidence in the record supporting the judge's

decision.' *United States v. Lloyd*, 71 F.3d 1256, 1262 (7th Cir. 1995). Unless 'the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth,' the court will only suppress evidence obtained under a facially valid warrant issued by a neutral and detached judge if the warrant is later invalidated and the police could not have relied in objective good faith upon the neutral and detached judge's decision to issue the warrant. *United States v. Koerth*, 312 F.3d 862, 865-66 (7th Cir. 2002) (quoting *United States v. Leon*, 468 U.S. 897, 914, 923 (1984)). When the parties dispute the question of good faith reliance by a police officer, the threshold question becomes: 'Did the affidavit provide the magistrate with a 'substantial basis' to rule that there was probable cause?' *Id.* at 866 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). If the answer is yes, 'the it follows that the officer's actions were reasonable.' *Id.* If the answer is no, the court must determine whether the officer could have reasonably believed that the facts set forth in the affidavit were sufficient to support a finding of probable cause. *Id.* (citations omitted).

If an 'affidavit is the only evidence presented to the warrant-issuing magistrate, 'the warrant must stand or fall solely on the contents of the affidavit.' *Id.* at 866 (quoting *United States v. Roth*, 391 F.2d 507, 509 (7th Cir. 1967). In the instant case, the Indiana judge did not know the name or identity of the CI, nor was any live testimony offered before him. As such, the responsibility of the issuing judge 'is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.' *Gates*, 462 U.S. at 238. In doing so, the issuing judge's

'actions cannot be a mere
ratification of the bare conclusions of others.' *Id.* at 239.

The duty of this court 'is simply to ensure that the magistrate had a 'substantial basis for concluding that probable cause existed.'' *Koerth,* 312 F.3d at 866. (Citation omitted). To carry out that duty, the court must examine the 'totality of the circumstances to determine whether the affidavit on its face established probable cause.' *Id.* Probable cause does not require an actual showing of criminal activity, but only a 'probability or substantial chance' of such activity. *Gates,* 462 U.S. at 243 n.13. While it denotes, 'more than mere suspicion,' it does not require certainty. *United States v. Ellery,* 678 F.2d 674, 677 (7th Cir. 1982). Probable cause is a fluid, flexible, practical, nontechnical concept. *Gates,* 462 U.S. at 232. To reiterate, however, the state court judge's 'decision to issue a warrant 'is to be given considerable weight' and should be overruled only when the supporting affidavit, read as a whole in a realistic and common sense manner, fails to allege specific facts and circumstances to allow the judge to reasonably conclude that the items sought to be seized are associated with the crime and located in a place indicated.' *Koerth,* 312 F.3d at 866-67 (citation omitted).

In this case, the information contained in Foster's affidavit accompanying his request for a search warrant was premised primarily on a tip provided by the CI and the Ci's assistance in a controlled drug buy. Defendant Miller argues that the information provided by the CI as described in the affidavit fails to support a finding of probable cause for several reasons: (1) it lacks specific details; (2) was not independently corroborated; (3) was not provided under oath; and (4) fails to establish a nexus between the premises to be searched and the criminal evidence that the warrant seeks to discover. Miller also is critical of the fact that the CI did not testify before the warrant-issuing judge. No single factor controls, however, and

each issue cited by Miller simply bears on the totality-of-the-circumstances inquiry. As described below, the court finds that the affidavit supports a finding of probable cause.

With respect to the detail provided by the CI, Miller correctly notes that the Seventh Circuit considers several factors when evaluating an affidavit supported by an informant's tip. Specifically, the court is to analyze:

> (1) the extent to which the police have corroborated the informant's statements; (2) the degree to which the informant has acquired knowledge of the events throu gh firsthand observation; (3) the amount of detail provided; and (4) the interval between the date of the events and the police officer's application for the search warrant.

Id. at 866 (citations omitted). In the narcotics context, Miller contends that the four factors described above should incorporate information related to the number of times the CI purchased drugs from the suspect, the quantity of drugs purchased, method of payment, locations of sales, whether anyone else was present at the sales, and whether he or she observed anyone else purchasing drugs from the suspect.

In the instant case, the CI's statement that he or she could have purchased drugs from an individual named Taryll Miller, when not made pursuant to a sworn affidavit or before the issuing judge at a hearing, would most likely be insufficient on its own to establish probable cause. *See United States v. Reddrick*, 90 F.3d 1276, 1281 (7th Cir. 1996). However, the supporting affidavit contains much for information than simply a tip provided by an informant. The affidavit references the fact that the CI alleged to have made prior purchases from the Defendant, but it does not end there. Rather, the affidavit contains the details of a carefully structured controlled drug purchase by the CI, which was conducted under police surveillance. The controlled buy began when Detective Foster

overheard a telephone call placed by the CI to a person who identified himself as 'Taryll.' Five minutes after the Ci arranged a drug purchase over the phone, a person later identified as Defendant Miller left the residence at 6644 Greenshire Drive and was followed to the designated distribution site. [15] Prior to arrival at that site, the CI's person and vehicle were searched, and the CI was provided with prerecorded 'buy money.' The CI was kept under constant surveillance all the way to the designated meeting place. Once at the site, both the CI and Defendant Miller were observed as they participated in a transaction. After the transaction, Detective Foster followed the CI to a predetermined location and was handed a baggy containing crack cocaine. The CI also no longer possessed any of the buy money. As the forgoing makes clear, the issuing judge did not rely solely on a tip by the CI. The affidavit detailed first-had observations by law enforcement officers, not hearsay statements of the CI and provided substantial detail of drug distribution activity. Though Foster did not see actual cocaine pass in the transaction, that fact alone does not mean his affidavit is false. The

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[15] Miller argues the CI's description of Miller as a black male was so general as to be virtually meaningless because of complexion differences, shades, coloring, hairstyles, tattoos, and other distinguishing marks. He makes the confusing assertion that such details are required in the totality-of-the-circumstances inquiry. This argument is untenable. There is nothing in the description of Miller in the affidavit, either from the CI or Foster, which contradicts the additional identifying marks Miller provides in his affidavit. More importantly, the physical description is irrelevant because of the observations of an individual who left the residence five minutes after the Ci's phone call setting up the buy and then arrived at the arranged buy location. Even if the person who went from the residence to the buy location was not Miller, and there is no indication that such was the case, the affidavit still contains probable cause to search the residence and the person who is described in it.

affidavit describes a controlled buy where a CI, who had been given marked money, is observed in the presence of the Defendant for a short period of time and then returns to the police under controlled conditions with cocaine now in his or her possession. The observations of the controlled buy, the observed phone call that set up the buy, and the reasonable inferences that an be drawn under these circumstances all serve to corroborate the CI's statement that he or she could purchase drugs from Defendant Miller. *Id.* (Holding that while 'information for the informant alone could not have supported the issuance of a search warrant,' when combined with controlled buys of illegal drugs from the defendant, enough evidence existed to support the issuance of the warrant). Moreover, the time frame encompassing the CI's tip, controlled buy, and warrant request was no more than seventy-two hours.[16]

Additionally, Detective Foster's background, training, and experience in law enforcement, particularly narcotics investigations and the execution of search warrants, coupled with his opinions based thereon and on the observations of other police officers, support the issuing judge's determination that probable cause existed to search the residence. The issuing judge is 'entitled to take into account' the experiences of trained officers whose affidavits explain the significance of specific types of information.' *United States v. Lamon,* 930 F.2d 1183, 1189 (7th Cir. 2003) ('In making probable-cause determinations, law enforcement agents are entitled to draw

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[16] Miller criticizes the absence in the affidavit of certain biographical evidence related to the CI, including the CI's prior reliability, criminal record, drug use, drug distribution, recent arrests, or whether he or she was being paid for given other incentives to provide information to the police. While such information may be important in a case where probable cause depended solely on accusations made by an informant, the lack of such evidence is not fatal in the instant case where the warrant is based on first-hand observations and a controlled drug buy.

reasonable inferences from the facts before them, based on their training and experience') (citation omitted); see also *United States v McNeal,* 82 F. Supp. 2d 945, 953 (S.D. Ind. 2000) ('Of course, the judge reviewing the affidavit should use common sense and can rely on his/her own experience and judgment.'). Specifically, Foster opined that drug dealers commonly keep drugs, money, and documents and records related to narcotics distribution inside their residences. *See Lamon,* 930 F.3d at 1189 (finding a substantial basis for probable cause determination premised in part on detective's experience that drug dealers often hide money, drugs, and other evidence at their residences). The issuing judge also had the fact before him that Miller (or at least an African- American male) came from the residence immediately prior to the controlled buy, further demonstrating the likelihood that drugs would be found at the location to be searched.

In addition to probable cause, case law requires a reasonable nexus between the evidence sought and the location to be searched. *See United States v. Sleet,* 54 F.3d 303, 306-07 (7th Cir. 1995), Many of the facts cited above that support a finding of probable cause also establish such a nexus in this case. The first-hand observations of Defendant Miller coming and going from the 6644 Greenshire Drive residence by Foster and other police officers, and especially the departure from that apartment of the person who then met with the CI five minutes prior to the controlled buy, directly link the source of the crack cocaine obtained by the CI to that location. The judge reviewing the information provided by the affidavit can easily infer that the drugs distributed to the CI in the controlled buy came from the residence, or from Miller's person or his vehicle. Foster performed a background check that revealed a prior police report linking Miller to Annocha Frierson (based on a theft of Miller's belongings from her residence), a public utilities check indicating that the residence was claimed by

Frierson, and a driver's license report showing the residence as Miller's address. Such records, combined with the observations of Miller coming and going from the residence, leave plenty of room for a reasonable inference that it was his residence, or at least the residence of the person who participated in the observed controlled drug buy. Furthermore, Foster's opinion that, based on his experience and training, drug dealers often keep drugs and other incriminating evidence in their homes remains relevant to the nexus determination once other evidence indicates Miller (or, again, at least the person who participated in a drug transaction with the CI) made his residence at the location to be searched.[17]

ii. Good-Faith Reliance

Even if a reviewing court would find the search warrant to be invalid due to a lack of probable cause, which this court obviously does not, the search would still fall within the good faith exception of *United States v. Leon,* 468 U.S. 897 (1984). Under *Leon*, if a defendant establishes the invalidity of a search warrant, the government bears the burden of demonstrating that the police relied in good faith on the issuing judge's decision to authorize the warrant. *Leon*, 468 U.S. at 924. The fact that the police obtained a warrant is prima facie evidence of good faith, and will require Defendant Miller 'to establish that: (1)

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[17] Miller is highly critical of the fact that the affidavit does not include information as to whether the CI was ever inside the residence, or witnessed anyone buying drugs from Miller at the residence. However, as indicated above, the standard for issuance of a search warrant is not a prediction that it is probable, that is, more likely than not, that something incriminating will be found. Rather, the standard is met if it is sufficient to persuade the issuing judge that there is a fair probability that incriminating evidence may be found in the place to be searched. Foster's observations and experience are not enough to establish the necessary nexus and probable cause, even without any information from the CI as to specific details related to the residence.

the magistrate 'wholly abandoned his judicial role,' or otherwise failed in his duty to 'perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police'; or (2) the officer submitted an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' *Koerth*, 312 F.3d at 868 (citations omitted).

In his attempt to rebut the prima facie evidence of good-faith reliance, Defendant Miller argues that the search warrant in this case was merely 'rubber stamped' by the issuing judge, and this demonstrates that the judge failed to 'perform his 'neutral and detached' function. *Leon*, 468 U.S. at 923 (citations omitted). As purported evidence of 'rubber stamping,' Miller contends that no testimony was taken from the CI, the affidavit was prepared without the assistance of a prosecuting attorney, as standard police department form was used for the warrant, the affidavit and warrant were personally delivered to the issuing judge by Detective Foster, and, ultimately, that the affidavit was so facially deficient that any official belief in the existence of probable cause is unreasonable. None of these agreements support the suppression of the results of the search or eliminate the good faith exception cited above; rather, they are merely empty assertions.

First, although it is true that no testimony was taken from the CI before the issuing judge, that a standard form was used for the warrant, and that it was prepared without the assistance of a prosecuting attorney, none of those facts demonstrate the absence of a neutral and detached consideration of the affidavit. There is no requirement that there be live testimony to establish probable cause-an affidavit is unquestionably sufficient if it contains reliable information. All that is lost by the absence of testimony is that a credibility determination based on physical observations of the witness is unavailable. While it may have helped in a close case (for example,

if the only evidence supporting probable cause is an informant's tip), there is sufficient indicia of reliability in this case that, given the totality of the circumstances, the fact that the issuing judge did not have the opportunity to hear live testimony from the CI is of no consequence.

As for the use of a standard police department form, Miller's argument lacks merit. *See United States v. Hopson*, 184 F.3d 634, 637 (7th Cir. 1999). Only a very small portion of the warrant is form or 'boilerplate' language. Specifically, only the title, the introductory paragraph describing the effect of the warrant, and the date and signature lines are preprinted words-the remainder of the document is clearly individually written and focused on the particulars of the instant case. There is no possible suggestion that the body of the warrant is boilerplate. Furthermore, the fact that Foster did not prepare his affidavit with the assistance of a prosecutor would only be relevant to an analysis of the officer's good-faith reliance, and not to questions regarding the warrant-issuing procedure. *See United States v. Merritt*, 361 F.3d 1005, 1012 (7th Cir. 2004).

Next, Foster's personal delivery of the affidavit and warrant to the issuing judge is of no import. Miller offered no evidence whatsoever that Foster's presence influenced the judge or impaired his impartiality in any way. There is simply no requirement that someone other than the police-officer affiant deliver the affidavit to the reviewing judge.

Finally, the validity of the content of the affidavit in establishing probable cause is adequately discussed in the preceding sections. Given the court's holding as to probable cause, there is no support for the argument that the facial invalidity of the affidavit demonstrates that it was rubber stamped. Therefore, the contention that the warrant was rubber stamped is not borne out by the evidence and must fail. The court holds that the issuing judge acted in a neutral and detached fashion and thus fulfilled his required duty.

The next step in the good-faith-reliance analysis, therefore, is whether the affidavit presented to the issuing judge was 'so lacking in indicia of probable cause,' that no police officer could have reasonably believed to the contrary. *Leon*, 468 U.S. at 923; see *Koerth*, 312 F.3d at 869. The court has already determined that the affidavit did establish probable cause, but in the alternative, the court finds that the police officers acted in good faith when relying on it.

Even if the search warrant was made pursuant to an invalid warrant, the evidence will still be allowed unless the following is true:

> (1) courts have clearly held that a materially similar affidavit previously failed to establish probable cause under facts that were indistinguishable from those presented in the case at hand; or (2) the affidavit is so plainly deficient that any reasonably well-trained officer 'would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.'

Koerth, 312 F.3d at 869 (citations omitted). Miller cites no cases that have found an affidavit materially similar to the one offered by Detective Foster to be lacking in probable cause. As described in more detail above, Foster's affidavit contains a tip by an informant that Miller was a drug dealer. This tip was corroborated by a carefully structured, observed controlled drug purchase. Foster's experience and training, along with the issuing judge's experience and common sense, make it reasonable to infer that drug dealers often keep other incriminating pieces of evidence within their residences. Additionally, all of the evidence provided in Foster's affidavit was gathered and submitted to the issuing judge within a short time period. For all of these reasons and others described throughout the preceding sections, the police officers in this case acted in

good-faith reliance on the search warrant, even if a reviewing court would find the warrant to be facially invalid.

B. Legality of the Traffic Stop

Defendant Miller argues that the October 14, 2003, traffic stop of his vehicle was illegal. In support of his claim, Miller contends that Officer Wildauer was not justified in making the stop, and further that the length and manner of his detention following the stop were not reasonably related to the reason why the stop was made. These arguments lack merit. Miller correctly notes that routine traffic stops are similar to an investigative detention and thus are generally examined according to the principles set forth in *Terry v. Ohio*, 392 U.S. 1 (1968). *See United States v. Finke*, 85 F.3d 1275, 1278 (7th Cir. 1996). Under *Terry*, an investigative stop must be based on reasonable suspicion supported by specific, articulable facts, and reasonably related in scope to the circumstances which justified interference in the first place. *Terry*, 392 U.S. at 27; *Fink*, 85 F.3d at 1279 (citations omitted). The stop 'must be 'temporary and last no longer than is necessary to effectuate the purpose of the stop.'' *Fink*, 85 F.3d at 1279 (quoting *Florida v Royer*, 460 U.S. 491, 500 (1983)).

In this case, Miller claims the traffic stop was illegal because Officer Wildauer cited a defective turn signal as the reason for the stop, yet issued no citation, and detained Miller for over twenty minutes after the stop. For these reasons, Miller concludes that Wildauer had no reasonable suspicion that would justify an investigative stop, and even if there was justification, that the twenty-minute detention was not reasonably related to a stop premised on a defective turn signal. Miller is completely off track. By focusing on case law relating to simple investigative stops, Miller has completely ignored the situation where probable cause justifies a custodial arrest. '[A]rrests are fundamentally different from *Terry* stops.' *United States v. Childs*, 277 F.3d 947, 952 (7th Circuit.

2002). Individuals placed under arrest do not need to be released as soon as possible. *Id.* Furthermore, 'a person stopped on probable cause may be searched fully, while a person stopped on reasonable suspicion may be patted down but not searched.' *Id.* (Citations omitted).

While Miller maintains that he was stopped for a defective turn signal, a signal that he maintains was fully functional, Officer Wildauer testified that he stopped the Defendant initially for two observed traffic violations: failure to signal prior to a turn and a lane violation. Even if Miller disputes the accuracy of Wildauer's assessment of the turn signal, testimony by Wildauer that it appeared to him that no turn signal was made is enough to justify the stop.[18] The fact that no citation was ultimately issued is of no consequence.[19] Furthermore, Wildauer testifed that Detective Foster informed him prior to the stop that Miller was driving with a suspended driver's license. Knowledge of the fact that Miller's license was suspended can be imputed to Wildauer because such

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[18] Moreover, as stated earlier, the court will credit Officer Wildauer's version of events because the court finds him to be the more credible witness based on his testimony and experience as a police officer.

[19] Though not articulated in his brief, Miller argued at the suppression hearing that the traffic stop and subsequent arrest were "pretextual." This argument has no merit. The court having heard all testimony, cannot infer that the officers were going to stop Miller regardless of whether he committed a traffic violation; rather, it appears that the officers believed it was likely that a violation would occur, not the least of which was Miller's driving with a suspended license. Moreover, the police observed Miller commit various traffic violations, which then justified the traffic stop. In sum, the stop and arrest were not pretextual. *See Devenpeck v. Alford*, ___ U.S. ___, 125 S. Ct. 588, 593-94 (2004); *Whren v. United States*, 517 U.S. 806, 812-13 (1996); *United States v. Trigg*, 878 F.2d 1037, 1041 (7th Cir. 1989).

information was communicated to him prior to the stop. *See United States v. Sawyer,* 224 F.3d 675, 680 (7th Cir. 2000) ("When law enforcement officers are in communication regarding a suspect, the knowledge of one officer can be imputed to the other officers under the collective knowledge doctrine.") (citations omitted). Miller concedes that ones he was pulled over he informed Wildauer of his license suspension. It was the cat that Miller's license was suspended, and not the issue of the turn signal that led to his arrest and detention at the scene of the stop.[20] This legal arrest makes it unnecessary for the court to decide whether the permissible scope of a *Terry* stop was exceeded-the only thing "the Constitution requires is that the entire process remain reasonable." *Childs,* 277 F. 3d at 954. In this case, the twenty-minute detention was patently reasonable, especially considering that Miller's suspended license made him legally unable to drive the vehicle away from the scene, and the police had probable cause to detain Miller based on his participation in a controlled drug buy.[21] Finally, though not expressly raised in Miller's motion, the court notes that the search of Miller's vehicle and person was fully justified as a search incident to arrest. *United States v. Robinson,* 414 U.S. 218 (1973).[22]

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[20] Miller is likely correct that the mere failure to signal would not justify a twenty-minute traffic stop. The court supposes that most traffic citations can be issued in under twenty minutes. However, as explained above, it was Miller's suspended license and corresponding arrest that justified the length of the stop.

[21] Though the government does not argue that the search warrant justified a search of Miller's vehicle at the stop site, the court notes that the warrant authorized a search of Miller's person and vehicle.

[22] Miller further contends that Detective Foster's arrival at the scene of the traffic stop twenty minutes after the stop had been made suggests that he was working with Officer Wildauer to get Miller into

C. Voluntariness of Defendant's Post-Arrest Statements

Defendant Miller claims that the police used threats and other coercive tactics to induce him to confess involuntarily. Only confessions made voluntarily can be introduced into evidence at trial. *United States v. Huerta,* 239 F.3d 865, 871 (7th Cir. 2001). According to the Seventh Circuit, a "'confession is voluntary if, in light of the totality of the circumstances, the confession is the product of a rational intellect and free will and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics that have overcome the defendant's free will.'" *United States v. Abdulla,* 294 F.3d 830, 836 (7th Cir. 2002) (citation omitted). Therefore, coercive police activity is a "necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due

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custody. According to Miller, such circumstances support a suspicion that Foster did not have a search warrant while Miller was physically inside the 6644 Greenshire Drive residence. If there was a warrant during surveillance of the residence, Miller states, then it should have been executed while he was still present. The fact that a warrant was not executed at that point causes Miller to presume that there was either no warrant, or that the warrant was so facially invalid that Foster did not feel he could reasonably rely upon it. Miller's arguments are without merit, bordering on frivolity. Law enforcement has considerable discretion as to when to execute a search warrant or make an arrest- the decision must be reasonable and probable cause must still exist. *See United States v. Husband,* 226 F.3d 626, 634 (7th Cir. 2000) ("within the limits of reasonableness, the decision on how to execute a warrant is generally left to the discretion of the police") (citation omitted); *Forman v. Richmond Police Dep't,* 104 F.3d 950, 962 (7th Cir. 1997); *United States v. Reis,* 906 F.2d 284, 289 (7th Cir. 1990). The search warrant in this case was less than one day old at the time of its execution, and the police may have had legitimate strategic and/or scheduling reasons for performing the search when they did. The same is true with respect to the traffic stop. There is simply no requirement that a traffic stop be made as soon as the first violation is committed.

Process Clause of the Fourteenth Amendment." *Colorado v. Connelly,* 479 U.S. 157, 167 (1986). Factors relevant to the coercion inquiry include "the defendant's age, education, intelligence level, and mental state; the length of the defendant's detention; the nature of the interrogation; the inclusion of advise about constitutional rights; and the use of physical punishment, including deprivation of food or sleep." *Huerta,* 239 F.3d at 871.

Defendant Miller argues that the post-arrest statements he made to law enforcement were involuntary because Detective Foster threatened to (1) arrest him and his girlfriend, Ms. Frierson; (2) place Miller's infant son in a public shelter; and (3) impound Miller's vehicle. Miller further asserts that his taped interview was pre-rehearsed, with Foster telling him what to say prior to the start of the recording. Finally, Miller cites the length and circumstances of his interrogations, which included being handcuffed for an extensive period of time, as additional evidence going to the involuntariness of his confession.

As an initial matter, Miller's counsel unsuccessfully attempted to develop support for the contention that Miller was "fed" his taped answers by Detectives Foster and Bradbury during sharp and aggressive questioning prior to their recording. The denials of "coaching" Miller by these detectives were credible, and the court will disregard the Defendant's claim that the words contained in his statement were "put into his mouth." Miller further contends that he was questioned aggressively, implying that the forcefulness of the questioning overbore his will. Again, the credible evidence does not support him. The tape recorded statement demonstrates an atmosphere of quiet, congenial conversation, and the testimony of Detectives Foster and Bradbury support the conclusion that the earlier questioning was similar in tone and nature.

However, Miller is on stronger ground when noting the

threats made by Detective Foster and the circumstances of his interrogation at the IPD East District police station on October 14, 2003. Once at the police station, Miller asked if he needed a lawyer in the event he decided to cooperate with law enforcement. Foster replied by saying that Miller did not need a lawyer, and that if he asked for one, both he and Ms. Frierson would be arrested. Though Miller did sign a waiver-of-rights form and had been Mirandized on several occasions prior to Foster's threat, this threat introduced a highly coercive element to the interrogation. Rather than simply saying that Miller's request for an attorney would end all questioning, Foster characterized the consequences of Miller's decision to exercise his constitutional rights in a manner that overbore the Defendant's free will. Essentially, Foster's threat to arrest Ms. Frierson if Miller chose not to answer any questions injected an "extrinsic" consideration into the conversation that caused the Defendant to consider issues "beyond his own beliefs regarding his actual guilt or innocence, his moral sense of right and wrong, and his judgment regarding the likelihood that the police had garnered enough valid evidence linking him to the crime." *Holland v. McGinnis*, 963 F.2d 1044, 1051 (7th Cir. 1992). Implicit in Foster's threat were two options for Miller: confess, and you and your girlfriend go free; fail to confess (that is, exercise your constitutional rights), and you and your girlfriend will be arrested and charged. In sum, even assuming the police did not threaten to place Miller's child in a public shelter or impound his vehicle,[23] the court finds that the threat

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[23] Though the Defendant implies that the offer of continued use of his vehicle was an improper inducement to obtain a confession, the reason for complying with his request to keep his truck was reasonable in that it was done to preserve Miller's confidentiality as an informant. It would be in the best interests of both the police and Miller that his sources and clientele have no reason to suspect any change in the status quo.

to arrest his live-in girlfriend (with whom he had the child) distorted Miller's ability to make a rational choice. *Id.; see United States v. Bolin*, 514 F.2d 554, 560-61 (7th Cir. 1975) (holding that consent to search was involuntarily because given only after law enforcement threatened to arrest defendant's girlfriend).

Along with the threat to arrest Ms. Frierson, additional consideration lead the court to conclude that, under the totality of the circumstances, Miller's statements at the police station were involuntary. For one, Miller had been in custody for at least four hours prior to the threat and subsequent statement. During that period of time, Miller had been periodically handcuffed, repeatedly questioned, and shuffled to various locations. Miller also has a limited education, achieving only a GED, and the fact that he had a valid gun permit for the Glock handgun at the time of his arrest suggests that the twenty-six-year-old Defendant had only limited experience with law enforcement in the past. All of these factors, when coupled with the highly coercive threat to arrest Ms. Frierson, reveal that Defendant Miller's statements at the IPD East District police station were involuntary and not the product of his free will.

Notably, the court does not find that Miller asserted his right to counsel when he asked Foster if he needed a lawyer. As the government correctly stated during oral argument, a suspect must unambiguously request an attorney in order to trigger the requirement that questioning cease. *See Davis v. United States*, 512 U.S. 452, 458-59 (1994); *Lord v. Duckworth*, 29 F.3d 1216, 1221 (7th Cir. 1994). The court agrees that Miller never unambiguously requested counsel. However, this does not change the court's opinion that Miller's confession at the police station was involuntary. Furthermore, Miller's repeated statements to the effect that he "understood," which followed *Miranda* warnings and the threat made by Foster, do not

clearly show that the Defendant appreciated his constitutional rights. Rather, Miller may have simply "understood" that he had one option: confess, or Ms. Frierson would be arrested.

The court's holding that certain statements made by Defendant Miller were involuntary, and thus to be suppressed, applies only to those statements made at the IPD East District police station on October 14, 2003. There is no evidence that Miller's statements to Officer Wildauer and Detective Foster at the site of the traffic stop on the same day were involuntary. Miller had been freshly Mirandized prior to making those statements, and he does not assert that any threats were made against his girlfriend or child at that point. Miller *does* contend that threats to arrest Ms. Frierson were made at the 6644 Greenshire Drive residence while the search warrant was being executed. However, the government has indicated that statements made by Miller at that time will only be used in the event that the Defendant takes the witness stand at trial. The court will reserve ruling on the voluntariness of those statements until the issue arises, if indeed Miller decides to testify. Counsel for the Defendant has strongly hinted that the Defendant is not likely to testify, based on his tender of proposed jury instructions.

III. RESOLUTION

For the foregoing reasons, Defendant Miller's motion to suppress is hereby **GRANTED** in part and **DENIED** in part. Specifically, the statements made by Defendant Miller at the IPD East District on October 14, 2003, which the court finds to be involuntary and not the product of the Defendant's free will, must be suppressed at trial. The motion is **DENIED** with respect to any statements made by the Defendant prior to his arrival at 6644 Greenshire Drive on the evening of October 14, 2003, while in police custody. The motion is also **DENIED** with respect to items seized during searches of the Defendant's person, automobile and apartment at 6644 Greenshire Drive on

October 14, 2003.

ALL OF WHICH IS ENTERED this 21st day of January 2005.

S/_____
John Daniel Tinder, Judge
United States District Court

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